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## CITATIONS


Cases:

*Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819, certiorari granted, No. 328, this Term — 4

*Commissioner* v. *Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511, certiorari granted, Nos. 128, 129, this Term — 4

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*Commissioner* v. *James Q. Newton Trust*, 122 F. (2d) 416, pending on petition for certiorari, No. 645, this Term — 4

*Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846, certiorari granted, No. 503, this Term — 4

*Commissioner* v. *Southwest Consol. Corp.*, 119 F. (2d) 561, certiorari granted, No. 286, this Term — 4

Statute:

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429025—41

# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case September 19, 1941, affirming a decision of the United States Board of Tax Appeals.

**OPINIONS BELOW**

The memorandum opinion of the United States Board of Tax Appeals (R. 15–16) is unreported. The opinion of the Circuit Court of Appeals (R. 105–109) is reported in 121 F. (2d) 985.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 19, 1941. (R. 108.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Pursuant to plan, corporate assets were bought in at equity foreclosure sale by a bondholders' committee. The property was transferred to the taxpayer, a new corporation, in return for all its capital stock which was distributed to the depositing bondholders. The question is whether the basis of the assets for computing depreciation is the same as it would be in the hands of the old corporation under Section 113 (a) (7) of the Revenue Act of 1934. The answer depends upon whether the transaction constituted a "reorganization" within the definition of Section 112 (g) (1) of the Act.

## STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra*, pp. 5–6.

## STATEMENT

The taxpayer's predecessor corporation, the New Haven and Shore Line Railway Company, went into receivership in 1931. Thereafter, a bondholders' committee was formed, representing more than 95 per cent of the outstanding bonds of the Company ($441,500 out of $461,000) (R. 15, 29–30).

Pursuant to plan, the bondholders' committee in 1934 bought in the assets of the debtor at foreclosure sale for $60,000 and the interests of the stockholders were eliminated (R. 16, 30–31). The taxpayer was then formed and the assets transferred to it in exchange for all of its capital stock, which was distributed to depositing bondholders. Non-depositors received their pro rata share of the foreclosure price in cash (R. 16).

The taxpayer, in computing deductions for depreciation in its income and excess-profits tax returns for the period July 27, 1934, to December 31, 1934, and for the calendar year 1935, used as the basis the cost of the depreciable assets to the old company. The Commissioner, in determining deficiencies, used as the basis the cost of these assets to the committee, measured by the portion of the bid price allocable to them. The Board of Tax Appeals rejected the Commissioner's determination (R. 15), and the court below affirmed.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the taxpayer's assets had been acquired in connection with a "reorganization" of the old company and that therefore their basis was the cost to that company.

2. In failing to hold that the basis of the assets was their cost to the bondholders' committee.

3. In sustaining the decision of the Board of Tax Appeals.

## REASONS FOR GRANTING THE WRIT

The basic question in this case is the same as that involved in *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9th), and *Commissioner* v. *Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511 (C. C. A. 9th), in which the Court has granted certiorari on the taxpayer's petitions (Nos. 503, 128, and 129, respectively), and in *Commissioner* v. *Southwest Consol. Corp.*, 119 F. (2d) 561 (C. C. A. 5th), and *Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5th), in which the Court has granted certiorari on the Government's petitions (Nos. 286 and 328, respectively). The same primary question is also involved in *Commissioner* v. *Cement Investors, Inc.*, 122 F. (2d) 380 (C. C. A. 10th), *Commissioner* v. *James Q. Newton Trust*, 122 F. (2d) 416 (C. C. A. 10th), and *Commissioner* v. *James Q. Newton, Jr.*, 122 F. (2d) 416 (C. C. A. 10th), now pending on the Government's petitions for certiorari (Nos. 644, 645, and 646, respectively). The considerations for further review in those cases are likewise applicable here.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

December, 1941.

## APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, * * *

* * * * *

(h) *Definition of Control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * *

(U. S. C., Title 26, Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation where control of property remains in same persons.*—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. * * *

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(U. S. C., Title 26, Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(U. S. C., Title 26, Sec. 114.)

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 780.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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GUY T. HELVERING, Commissioner of Internal Revenue,
*Petitioner,*

v.

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

---

**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

---

## BRIEF FOR RESPONDENT IN OPPOSITION.

---

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## CITATIONS.

CASES:


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| Commissioner v. Palm Springs Holding Corp., 119 F. (2d) 846 (C. C. A. 9th) | 4 |
| Commissioner v. Bondholders Committee, Marlborough Investment Co., 118 F. (2d) 511 (C. C. A. 9th) | 4 |
| Commissioner v. Southwest Consol. Corp., 119 F. (2d) 561 (C. C. A. 5th) | 4 |
| Commissioner v. Alabama Asphaltic Limestone Co., 119 F. (2d) 819 (C. C. A. 5th) | 5 |


STATUTES:

Revenue Act of 1934, c. 277, 48 Stat. 680:


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| Sec. 112 (U. S. C., Title 26, Sec. 112) | 2, 4, 6 |
| Sec. 113 (U. S. C., Title 26, Sec. 113) | 2, 7 |
| Sec. 114 (U. S. C., Tit. 26, Sec. 114) | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 780.

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GUY T. HELVERING, Commissioner of Internal Revenue,
*Petitioner,*

v.

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

---

**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

---

## BRIEF FOR RESPONDENT IN OPPOSITION.

---

The Respondent taxpayer opposes the granting of the Petition for Writ of Certiorari herein, and prays that the Writ be denied.

### Opinion Below.

The Memorandum Opinion of the United States Board of Tax Appeals (R. 15-16) is unreported. The opinion of the Circuit Court of Appeals (R. 105-109) is reported in 121 F. (2d) 985.

### Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 19, 1941. (R. 108) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**Question Presented.**

Pursuant to plan, corporate assets were bought in at equity foreclosure sale by a bondholders' committee. The property was transferred to the taxpayer, a new corporation, in return for all its capital stock which was distributed to the depositing bondholders. The question is whether the basis of the assets for computing depreciation is the same as it would be in the hands of the old corporation under Section 113 (a) (7) of the Revenue Act of 1934. The answer depends on whether the transaction constituted a "reorganization" within the definition of Section 112 (g) (1) of the Act.

**Statute Involved.**

Revenue Act of 1934, c. 277, 48 Stat. 680 (see Index, page 6 *post*):

**Reason for Denying the Writ.**

The decision of the 9th Circuit Court in the case of Bondholders Committee, Marlborough Investment Co., and Marlborough House, Inc., is not in conflict with the instant decision by the 2nd Circuit Court, for the reason that there are a number of factual differences between that case and the instant case. These factual differences are set forth as follows:

1. The facts of the *Marlborough House* case did not specifically disclose a preexisting definite plan of reorganization. In the instant case the taxpayer was the result of, and all of the related steps taken were pursuant to, a definite plan of reorganization.

2. In the *Marlborough House* case the bondholder's committee after the foreclosure sale held and operated the property and received the income therefrom, as a separate entity, before turning it over to the new corporation after the redemption period had expired. In the instant case the bondholder's committee was merely a conduit of title; at no time handling and operating the property and business.

Also there was no period of redemption. The vesting of legal title in the taxpayer required only the time necessary for the mechanics of transfer.

3. In the Marlborough House case the "bid price" of $340,425 at the foreclosure sale probably approximated the value of the property sold. The Board found that the reason for this was two-fold: "First the amount of the bid was governed to some extent by the amount of cash available for payment to the non-depositing bondholders, and, second, in the event of redemption of the property, the bondholders wish to assure themselves of adequate and fair return on their investment" (40 B. T. A. 886). But no such considerations inspired the nominal $60,000 bid price in the instant case, except possibly the amount of cash available to satisfy the dissenting bondholders if the price should be required to be paid in cash. The record however discloses that the bid price was paid by cancellation of the deposited bonds rateably reduced. Furthermore, it is shown that the property was officially appraised by Order of Court for purposes of the foreclosure sale at $121,281.50, more than twice the amount of the "bid price" (See Petitioner's Exhibit 2 paragraph 4 Record p. 88). Unlike the *Marlborough House* case the bid price here had no relation to the value of the assets at the time of foreclosure.

Summing up these distinguishing factors, it is clear that in the instant case the foreclosure sale was merely a formality, one of the mechanical steps in a corporate reorganization, but that fact is not evident in the *Marlborough House* case.

In addition to the foregoing, attention is respectfully called to the fact that the *Marlborough House* case was decided under the Revenue Act of 1932, whereas, the instant case was decided under the Revenue Act of 1934. In the Revenue Act of 1934 for the first time the definition of Reorganization, in Section 112 (g) was amplified by the inclusion therein of sub-paragraph (B), which provides in substance that a reorganization means, "(B) the acquisition

by one corporation in exchange *solely for all or a part of its voting stock* * * * of substantially all the properties of another corporation." Under the definition of reorganization in the 1932 Act, this provision did not appear, so that it was necessary for the facts to show that after acquisition of the transferred assets by a new corporation "the transferor or its stockholders or bondholders are in control of the corporation to which the assets are transferred." For this reason, it was necessary to show that either the predecessor corporation or its *stockholders* in the literal sense of the word (not bondholders who were stepped up to the position of stockholders) were in control of the corporation, within the meaning of the definition of reorganization as it existed prior to 1934.

With respect to the 9th Circuit Court Court's decision in the *Palm Springs Holding Co.* case, 119 Fed. (2d) 846, the distinguishing factor there was that the taxpayer corporation acquired the defaulted bonds from the bondholder's protective committee before the property of the predecessor corporation was foreclosed at the sheriff's sale. Furthermore that case also is governed by the reorganization definition as contained in Section 112 (i) of the Revenue Act of 1932 which does not contain the provision as set forth for the first time in Section 112 (g) (B) of the Revenue Act of 1934 upon which the 2nd Circuit Court's decision entirely relies in the instant case.

## Conclusion.

Wherefore respondent prays:

That the Writ of Certiorari be denied;

In the event the Writ is granted, that this cause be consolidated for hearing with *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9th), and *Commissioner* v. *Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511 (C. C. A. 9th), in which the Court has granted certiorari on the taxpayer's petitions (Nos. 503, 128, and 129, respectively), and in *Commissioner* v. *South-*

*west Consol. Corp.*, 119 F. (2d) 561 (C. C. A. 5th), and *Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5th), in which the Court has granted certiorari on the Government's petitions (No. 286 and 328, respectively).

Respectfully submitted,

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## APPENDIX.

Sec. 112. Recognition of Gain or Loss.

* * * *

(g) Definition of Reorganization.—As used in this section and section 113—

(1) The term "Reorganization" means

(A) a statutory merger or consolidation, or

(B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or

(C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred * * *

(h) Definition of Control.—As used in this section the term "control" means the ownership of at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * *

(U. S. C. Title 26, Sec. 112)

Sec. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) Basis (Unadjusted) of property.—The basis of property shall be the cost of such property; except that—

* * * *

(7) Transfers to corporation where control of property remains in same persons.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such

transfer under the law applicable to the year in which the transfer was made. * * *

* * * *

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * *

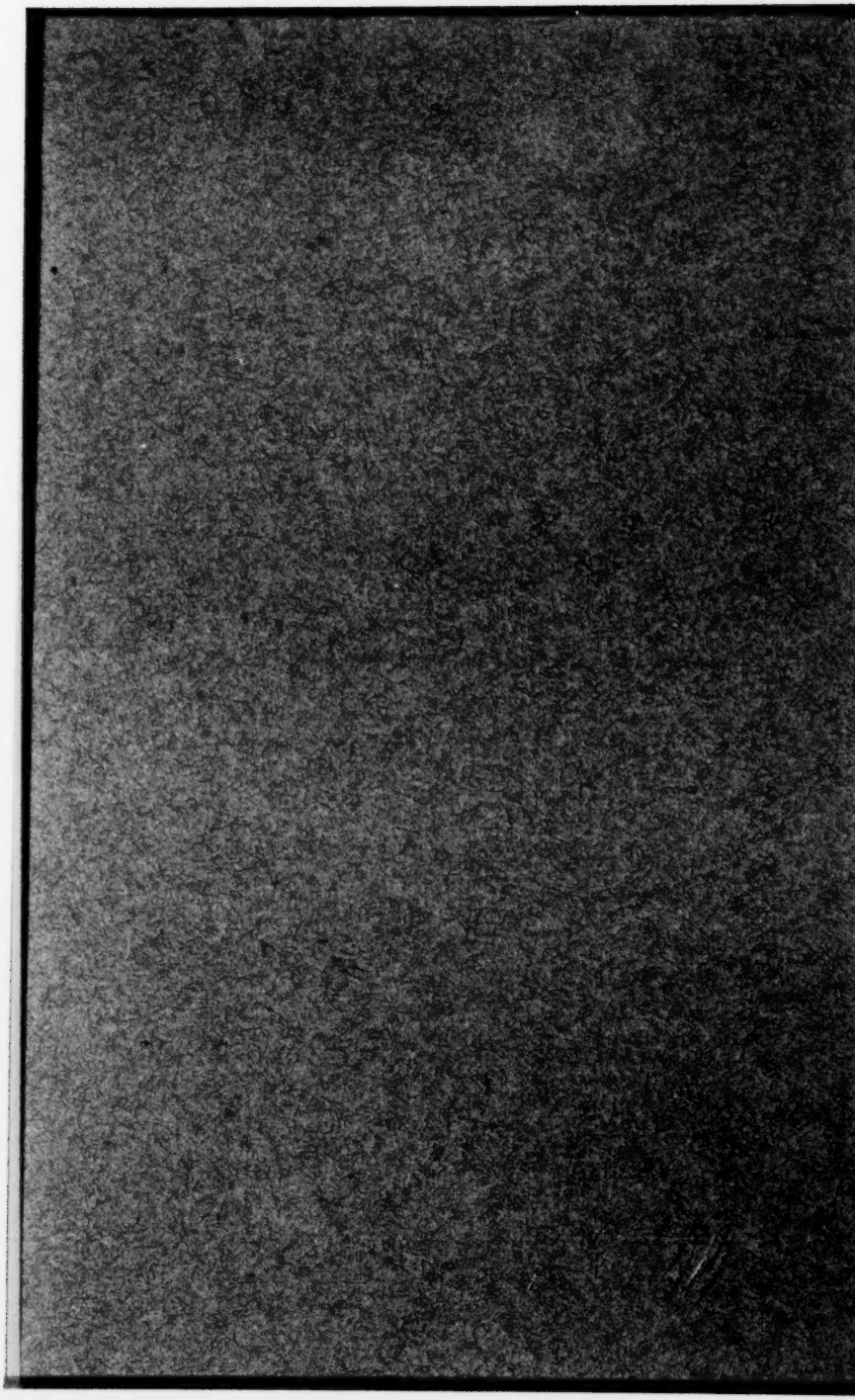
(U. S. C., Title 26, Sec. 113.)

Section 114. Basis for Depreciation and Depletion.

(a) Basis for Depreciation.—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * *

(U. S. C., Title 26, Sec. 114)



# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 780

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

*PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays for a reconsideration by the Court of its order of February 9, 1942, denying certiorari herein.

The disposition of this case is inconsistent with *Helvering* v. *Southwest Consolidated Corp.*, No. 286, decided February 2, 1942.

This case involves a transaction in which a bondholders committee, pursuant to plan, bought in the corporate assets at equity foreclosure sale, and transferred them to a new corporation, the taxpayer. Stockholders were eliminated. The as-

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senting bondholders received stock of the new company in exchange for their bonds. Nonassentors received their pro rata share of the foreclosure price in cash. The question is the basis of the assets for computing depreciation in the hands of the new company. The court below held that there was a "reorganization" under Clause B of Section 112 (g) (1) of the Revenue Act of 1934, c. 277, 48 Stat. 680, and that therefore the basis of the assets was the same as in the hands of the old corporation under Section 113 (a) (7).

The relevant provisions of Clause B define a reorganization to mean "the acquisition by one corporation in exchange *solely* for all or a part of its voting stock * * * of substantially all the properties of another corporation." Although the Government did not specifically direct the attention of the court below to the fact, found by the Board of Tax Appeals, that non-depositors received "their pro rata share of the purchase price in cash from funds in the hands of the bondholders' committee" (R. 16; see also Pet. for Certiorari, p. 3), the fact nevertheless remains that the exchange was not "solely" for stock.

When the same problem was before this Court in *Helvering* v. *Southwest Consolidated Corp.*, we pointed out that Clause B was inapplicable for one reason, because cash had thus been paid (Br. 21–22). The Court's opinion makes it plain that such a payment, arising out of the reorganization, precludes

the application of this provision. Accordingly, under the authority of that determination, the result below is believed to be erroneous.

It is respectfully submitted, therefore, that the order denying the petition for certiorari be vacated and the petition be granted.

CHARLES FAHY,
*Solicitor General.*

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
*Solicitor General.*

FEBRUARY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 780.

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GUY T. HELVERING, Commissioner of Internal Revenue,
*Petitioner*,

v.

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

---

**Brief in Opposition to Petition for Rehearing on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

---

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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GUY T. HELVERING, Commissioner of Internal Revenue,
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NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

---

**Brief in Opposition to Petition for Rehearing on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

---

Contrary to petitioner's contention the disposition by this Court of the instant case by denial of the Writ for Certiorari is entirely consistent with its opinion in the *Southwest Consolidated Corporation* case. Here the facts, as found by the Board of Tax Appeals, come literally within the definition of reorganization in Section 112(g)(1)(B) of the Revenue Act of 1934.

The record here may have shown as stated by the Board that "the dissenting bondholders were paid their pro rata share of the purchase price in cash from funds in the hands

of the bondholders' committee" (R. 16), but that fact of itself nullifies the petitioner's contention. Unlike the fact in the *Southwest Consolidated* case which prompted this Court's conclusion that something besides voting stock was issued by the acquiring corporation, no indebtedness of the bondholders' committee was assumed by the acquiring corporation in the instant case.

Here the acquiring corporation issued "solely voting stock" in exchange for the assets. There is no finding of fact or anything in the record to the contrary. The fact that the dissenting bondholders may have received pro-rata payments from funds in the hands of the committee, before the transfer to the taxpayer corporation, as to which transaction the taxpayer had no part and assumed no obligation, does not take this case out of the literal compliance with definition B of section 112(g)(1) of the 1934 Act. The fact remains that the taxpayer acquired substantially all the property of another corporation "in exchange *solely* for all or a part of its voting stock". Nothing but common voting shares was exchanged.

There is no merit to the petitioner's contention; the instant case clearly illustrates a statutory reorganization within the meaning of the new limitation on that term in the Revenue Act of 1934 as construed in this Court's recent pronouncement.

The petition for rehearing should be denied.

Respectfully submitted,

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